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Rajehgopal a/l Velu v Ganashalingam a/l Rajah (Majlis Peguam Malaysia, intervener)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(W)-452–03 OF 2015
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
4 AUGUST 2015

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Legal Profession — Disciplinary Proceedings — Disciplinary Committee — Decision of DB — Appeal against — Whether there was any requirement for DB to frame specific charge against appellant — Whether DC acted outside terms of power granted to it — Whether DC's decision made for the extraneous purpose — Whether decision null and void — Whether DB's decision was null and void

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The respondent lodged a complaint of fraud to the disciplinary board ('the DB) against the appellant, an advocate and solicitor. The respondent claimed that the appellant had committed fraud in the transfer of a property co-owned by the respondent's late mother and another. The appellant had allegedly attested the signatures of the two co-owners on an instrument of transfer but one of the co-owners claimed that she had not signed the said transfer. The disciplinary committee ('the DC') set up to hear the complaint found the appellant guilty of misconduct under s 94(3)(o) of the Legal Profession Act 1976 ('the Act') and recommended his suspension for a period of six months. The DB suspended the appellant for a period of one year. The appellant appealed to the High Court against the decision of the DB but the High Court found that the complaint was proven and that the appellant had committed a disciplinary offence. Thus the High Court dismissed the appeal. This was the appellant's appeal against the decision of the High Court on the grounds that there was no specific charge framed against the appellant and that the DB had not given any reasons for rejecting the recommendation of the DC and imposing a greater sentence. In reply the Bar Council submitted that there was no requirement for the DB to frame a charge against the appellant.

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Held, allowing the appeal with no order as to costs:

(1) Although there was no requirement under the Act for a charge to be framed against an advocate and solicitor, a charge should be precisely formulated to enable the appellant to be forewarned with clarity and certainty the essential elements against him in order to ensure that he could be forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge (see paras 14–15).

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(2) Further, the DC had made a finding that there was insufficient evidence to prove that the appellant had intentionally participated in the alleged fraud perpetrated on the owners of the property. As such, the DC found the appellant not guilty of the alleged fraud under s 94(3)(c) of the Act. Despite being exonerated of the complaint of fraud against him the DC found that the appellant had acted unprofessionally in attesting the signatures in question, ie an offence under s 94(3)(o) of the Act. However, this finding was not the subject matter of the complaint and the DC had acted outside the terms of power granted to it, which was to inquire into the complaint of fraud. In the circumstances, the DC's finding that that the appellant was guilty of misconduct was made for the extraneous purpose and was thus null and void for illegality (see paras 16–17).

(3) As the decision of the DB in imposing the suspension of one year on the appellant was founded on the DC's finding and recommendation, it would follow that the DB's decision was also null and void (see para 18).

[Bahasa Malaysia summary

Responden membuat aduan fraud kepada lembaga tatatertib ('LT') terhadap perayu, peguam bela dan peguam cara. Responden mendakwa bahawa perayu melakukan fraud dalam pemindahan hartanah yang dimiliki bersama oleh mendiang ibu responden dan seorang lagi. Perayu telah mendakwa mengesahkan tandatangan-tandatangan kedua-dua pemilik bersama atas surat cara pemindahan tetapi salah seorang daripada pemilik bersama mendakwa yang dia tidak menendatangani pemindahan tersebut. Jawatankuasa tatatertib ('JT') menetapkan untuk mendengar aduan mendapati perayu bersalah kerana salah laku di bawah s 94(3)(o) Akta Profesion Undang-Undang 1976 ('Akta') dan mencadangkan penggantungannya bagi tempoh enam bulan. LT menggantung perayu bagi tempoh satu tahun. Perayu merayu kepada Mahkamah Tinggi terhadap keputusan LT tetapi Mahkamah Tinggi mendapati bahawa aduan tersebut telah dibuktikan dan bahawa perayu telah melakukan kesalahan tatatertib. Oleh itu Mahkamah Tinggi menolak rayuan. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi atas alasan bahawa tidak terdapat tuduhan spesifik yang dirangka terhadap perayu dan bahawa dan bahawa LT tidak memberikan apa-apa alasan untuk menolak cadangan JT dan mengenakan hukuman yang lebih besar. Dalam menjawab Majlis Peguam berhujah bahawa tidak ada keperluan untuk LT merangka tuduhan terhadap perayu.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Walaupun tidak ada keperluan di bawah Akta untuk tuduhan dirangkakan oleh peguam bela dan peguam cara, tuduhan patut dirumuskan secara tepat untuk membolehkan perayu diberi amaran dengan kejelasan dan kepastian unsur-unsur asas terhadapnya supaya

dapat memastikan bahawa dia dapat bersedia dalam pembelaan bagi tujuan mengarahkan kesemua keterangan secara eksklusif kepada tuduhan spesifik (lihat perenggan 14–15).

(2) Selanjutnya, JT telah membuat dapatan bahawa terdapat keterangan yang tidak mencukupi untuk membuktikan bahawa perayu telah berniat untuk menyertai dalam fraud yang didakwa dilakukan ke atas pemilik hartanah. Dengan itu, JT mendapati perayu tidak bersalah terhadap fraud yang didakwa di bawah s 94(3)(c) Akta. Meskipun dilepaskan daripada aduan fraud terhadapnya JT mendapati bahawa perayu telah bertindak secara tidak profesional dalam mengesahkan tandatangan-tandatangan yang dipersoalkan iaitu kesalahan di bawah s 94(3)(o) Akta. Walau bagaimanapun, dapatan ini bukan perkara aduan dan JT telah bertindak di luar terma kuasa yang diberikan kepadanya, yang mana adalah untuk menanyakan mengenai aduan fraud tersebut. Dalam keadaan ini, dapatan JT bahawa perayu bersalah kerana salah laku dibuat bagi tujuan yang tidak berkaitan dan oleh itu adalah batal dan tak sah kerana salah di sisi undang-undang (lihat perenggan 16–17).

(3) Memandangkan keputusan LT dalam mengenakan penggantungan satu tahun ke atas perayu adalah berdasarkan ke atas dapatan dan cadangan JT, oleh itu keputusan LT juga adalah batal dan tak sah (lihat perenggan 18).]

Notes

For cases on discipinary committee, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1541–1547.

Cases referred to

Abdullah bin Borhan v Ketua Polis Melaka & Anor [2008] 8 MLJ 161; [2008] 9 CLJ 605, HC (refd)

B Surinder Singh Kanda v The Government of The Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Batu Malay a/l Thandy v Saulinardi & Anor [2015] 2 MLJ 364; [2015] 1 CLJ 33, CA (refd)

Brian Komathi S Komali v Tan Kiang Bhu Notis Usul Pemula No 17-36 tahun 2010, HC (refd)

Jerald Allen Gomez v Shencourt Sdn Bhd Majlis Peguam (intervenor) [2006] 2 MLJ 343; [2006] 1 CLJ 88, HC (refd)

Lim Teng Ee Joyce v Singapore Medical Council [2005] SGHC 129, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd)

Saufee A Rahman v Che Yussof Che Ngah & Ors [2014] 7 CLJ 691, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(o), 103B
National Land Code s 211, Form 14A

Appeal from: Originating Summons No 17D-1–05 of 2014 (High Court, Shah Alam)

T Gunaseelan (Rama Velu with him) (Rama Velu & Assoc) for the appellant.
Ho Jack S'ng (Lee Hishammuddin Allen & Gledhill) for the intervener.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal relates to a decision of the High Court dismissing the appellant's appeal against the decision of the disciplinary board ('the DB') given on 16 May 2014 suspending the appellant for a period of one year.

BRIEF ACCOUNT OF THE SALIENT FACTS

[2] By a letter of complaint dated 21 July 2013 addressed to the DB, the respondent made the following assertions ('the complaint'):

a) the respondent's late mother and one Mdm Poonamah were the registered owners of a piece of landed property ('the property');

b) on or about 4 March 2002, the property was transferred to one Soo Chee Ming ('Mr Soo') under a Form 14A purportedly signed by the respondent's late mother and Mdm Ponnamah;

c) the signatures of the respondent's late mother and Mdm Ponnamah were attested by the appellant, an advocate and solicitor;

d) the respondent's late mother died on 10 April 1994;

e) Mdm Ponnamah did not sign the Form 14A; and

f) by reason of the above, the appellant has committed fraud ('penipuan').

[3] An investigating tribunal which was set up to hear the complaint recommended that there be a formal investigation by the disciplinary committee ('the DC') on the complaint.

[4] The DC which was appointed to hear the complaint found the appellant guilty of conduct unbefitting of an advocate and solicitor under s 94(3)(o) of the Legal Profession Act 1976 ('the LPA 1976') and recommended that the appellant be suspended for a period of six months.

[5] The DB imposed a greater punishment and suspended the appellant for a period of one year.

FINDINGS OF THE HIGH COURT

[6] In essence, the learned judge made three rulings. First, the learned judge found that the fact that no specific charge was preferred against the appellant was not fatal. It did not hamper the defence of the appellant as the appellant was aware of the complaint against him.

[7] Second, the learned judge found that the non-calling of one Ms Abigail (an advocate and solicitor who prepared the sale and purchase agreement and the Form 14A and where attested the signature of Mr Soo) did not prejudice the appellant as the appellant did not deny attesting the two signatures in question.

[8] Third, the learned judge found that the word 'shall' in s 211 of the National Land Code ('the NLC') makes it a mandatory requirement for the person authorised to attest a signature on an instrument of transfer to ensure that an instrument is signed before him. On the facts, the appellant had breached s 211 of the NLC. There is no provision in the NLC which allows for attestation based on trust and in the absence of the person executing the document. As such, the complaint was proven and the appellant had committed a disciplinary offence for which he could be disciplined.

SUBMISSION OF PARTIES

[9] Learned counsel for the appellant canvassed the appeal on two main grounds. The first relates to the question of whether a charge should have been framed. The second relates to the punishment which was increased by the DB without giving any reasons.

[10] On the first issue, it was argued that no charge was framed. On the basis of the complaint, the alleged misconduct could fall under subs 94(3)(c) or (o) of the LPA 1976. However, the DC found the appellant guilty of conduct unbefitting of an advocate and solicitor under sub-s 94(3)(o) of the LPA 1976. The appellant is only expected to answer the charge and nothing else *Brian Komathi S Komali v Tan Kiang Bhu* Johor Bahru High Court, Notis Usul Pemula No 17-36 tahun 2010 (unreported) *Abdullah bin Borhan v Ketua Polis Melaka & Anor* [2008] 8 MLJ 161; [2008] 9 CLJ 605; *Saufee A Rahman v Che Yussof Che Ngah & Ors* [2014] 7 CLJ 691 (CA)).

[11] On the second issue, learned counsel for the appellant argued that the DB did not give any reasons for rejecting the recommendation of the DC when

A the DB imposed a punishment of suspension of one year instead of six months which was recommended by the DC (s 103D(1) of the LPA 1976; *Batu Malay a/l Thandy v Saulinardi & Anor* [2015] 2 MLJ 364; [2015] 1 CLJ 33 (CA)).

B **[12]** In reply, learned counsel for the Bar Council (respondent/intervener) argued that there is no requirement for the DB to frame a charge against the appellant. The appellant was well aware of the complaint against him. The DB is not the prosecuting body. It is only facilitating the complaint to be brought before the DC.

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[13] Learned counsel for the Bar Council also argued that the only requirement is that there was no violation of the rules of natural justice. Where the DB exercises its power for which the procedures in its proceedings was not provided by law, the court will assume that in following its ad hoc procedure,
D it has exercised that power in a regular manner (*Jerald Allen Gomez v Shencourt Sdn Bhd Majlis Peguam (intervenor)* [2006] 2 MLJ 343; [2006] 1 CLJ 88).

DECISION

E **[14]** On the first issue, it is not in dispute that no charge was framed against the appellant. In fact there is no requirement under the LPA 1976 for a charge to be framed against an advocate and solicitor.

[15] Be that as it may, we note that the disciplinary proceedings initiated
F against an advocate and solicitor are serious and carry penal consequences such as a fine, suspension or being struck off the roll of advocates and solicitors. Accordingly, we agree with the view in *Abdullah Borhan v Ketua Polis Melaka & Another* that the charge in question must be precisely formulated to include the specific accusation against the appellant who has the right to know and must
G have notice of the very nature of the charge at the first opportunity. This will enable the appellant to be forewarned with clarity and certainty the essential elements or ingredients against him in order to ensure that he can be forearmed in his defence for the purpose of directing all the evidence exclusively to the specific charge (see also the Privy Council's opinion in *B Surinder Singh Kanda*
H *v The Government of The Federation of Malaya* [1962] 1 MLJ 169(PC)). The view that in a disciplinary process, the respondent is only required to respond to the charge and nothing else was approved in *Lim Teng Ee Joyce v Singapore Medical Council* [2005] SGHC 129.

I **[16]** Quite apart from the abovementioned, we also noted another significant fact. It is this. The DC had made a finding that there is insufficient evidence to prove the appellant had intentionally participated in the alleged fraud perpetrated on the owners of the property. In other words, the DC found that the complaint of fraud against the appellant has not been proven.

Therefore, the DC found the appellant not guilty of the alleged dishonest or fraudulent conduct in the discharge of his duties under sub-s 94(3)(c) of the LPA 1976. Notwithstanding the said finding, the DC went on to hold that the appellant had acted unprofessionally in attesting the signatures in question. On that premise, the DC found the appellant guilty of misconduct which is unbefitting of an advocate and solicitor under sub-s 94(3)(o) of the LPA 1976.

[17] In this instance, the DC was appointed to conduct an inquiry into the complaint pursuant to s 103B of the LPA 1976. The appellant was exonerated of the complaint of fraud against him. The finding that the appellant had acted unprofessionally in attesting the signatures in question was not the subject matter of the complaint. In our view, the DC had acted outside the terms of power granted to it; which is to inquire into the complaint of fraud. The DC's finding that the appellant is guilty of misconduct was made for an extraneous purpose (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 1). Accordingly, we are constrained to hold that the DC's decision is null and void for illegality.

[18] As the decision of the DB in imposing the suspension of one year on the appellant is founded on the DC's finding and recommendation, it must follow that the DB's decision is also null and void.

[19] For the foregoing reasons, the appeal was allowed. We made no order as to costs.

Appeal allowed with no order as to costs.

Reported by Kohila Nesan